Finally, although the Commission should not compel cable operators and OVS operators to share PEG programming, OVS operators should be free to negotiate with cable systems to contract for PEG channel feeds. In the event that arrangements cannot be reached between the parties, the OVS operator should be required separately to comply with the PEG requirements, as mandated by Congress.

2. OVS Operators Must Fulfill Other Mandated Requirements

The 1996 Act requires that OVS operators comply with the Commission's regulations concerning sports exclusivity, network non-duplication, and syndicated exclusivity.[74] Here too, just as cable operators already comply with these requirements across multiple community units or geographic zones,[75] OVS operators should be required to do so as well.

The Act also provides that OVS operators are subject to the Commission's program access rules.[76] Just as cable operators comply with the Commission's rules, so too must OVS operators. What the Commission should not do, however, is interpret this provision to dilute the "rights of programming producers, vendors, and other entities responsible for programming content to exercise control over their products."[77] Congress intended OVS

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[74] 1996 Act, § 653(b)(1)(D). See 47 C.F.R. § 76.67 (sports exclusivity); 47 C.F.R. § 76.92 et seq. (network non-duplication); and 47 C.F.R. § 76.151 et seq. ("synd/ex").

[75] NPRM at ¶ 46. The Act does not accommodate circumstances where certain channels on an open video system, which distribute network affiliates, are shared by two or more programming providers. In order to comply with the Act, the rules must be enforced: the OVS operator will have to drop the channel, determine how to comply, or carry the network separately for each separate programming provider's offering.

[76] 1996 Act, § 653(c)(1)(A).

[77] NPRM at ¶ 41.

operators to have equivalent obligations as cable operators in this regard, but this does not mean that Congress intended to supplant the rights of video programmers utilizing OVS to make decisions regarding channel capacity or to determine the manner in which their program services are to be provided. Thus, Congress did not intend for the program access rules to be used by certain OVS video programmers to license programming for OVS. Any other interpretation would vitiate the nondiscrimination premise of OVS and thwart the robust competition that was envisioned.

3. The OVS Rules Must Not Undermine the Public Policies Underlying State Level Playing Field Statutes

In implementing OVS regulation, the Commission must also be cognizant of state "level playing field" statutes, which typically require that all potential new cable entrants are subject to terms and conditions that are no more favorable than those imposed on existing cable operators.[78/] Such state level playing field laws have been enacted in order to promote the critical public interest objectives of providing consumers with additional programming choices and the development of effective and equitable competition in the cable marketplace. In addition, by ensuring that all competitors build out their services areas fully, rather than selectively deploy service, these laws help promote equality of service to consumers.[79/]

Significantly, such state level playing field provisions are wholly consistent with and promote the Congressional intent that the Commission "impose obligations that are no greater

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[78/] See, e.g., Conn. Gen. Stat. § 16-331(i); California Government Code § 53066.3.

[79/] Id.

or lesser" than those imposed on cable operators.[80] For example, the California "level playing field" statute provides that additional cable television franchisees must "contain the same public, educational, and governmental access requirements that are set forth in the existing franchise."[81] The fundamental purpose of this provision is to ensure that the needs and interests of local communities are served fully by all cable providers without the threat of anticompetitive forces such as redlining and greenmailing. Accordingly, imposition of different or lesser obligations on OVS operators providing cable service than on existing cable operators within their franchise areas is not only contrary to the 1996 Act, but also undermines these critical public interest determinations by state legislatures.

II. THE STATUTORY OBLIGATION TO OFFER JUST AND REASONABLE RATES REQUIRES THAT RATES BE BASED ON COST CAUSATION PRINCIPLES

While the 1996 Act enables a LEC, at its election, to offer video programming over its own facilities as an OVS operator, it does not authorize the LEC to subsidize such a system at the expense of its telephone ratepayers.[82] Indeed, the 1996 Act explicitly requires that OVS "rates, terms, and conditions" shall be "just and reasonable."[83] The only truly effective means for achieving this statutory obligation is the economically correct assignment of the underlying network costs to the video services and telephony categories. Moreover, if the Commission is to fulfill its obligation to provide "just and reasonable rates"

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[80] 1996 Act, § 653(c)(2)(A).

[81] California Government Code, Section 53066.3. See also Conn. Gen. Stat. § 16-331(i).

[82] See 1996 Act, § 653(b)(1)(A).

[83] Id.

for the subscribers of Title II common carriage services,[84] it must commit to a fundamental and thorough examination designed to reach the critical determination that all costs incurred due to a decision to deploy a particular service are to be assigned to that service.

The Commission must prescribe cost allocation procedures as a precondition to the deployment of any OVS platform to segregate the common costs, including facilities, personnel, and other service costs, depreciation expenses, and overhead costs of providing video and telephone services over the same facilities. Indeed, failure to prescribe cost-causative rates will thwart fair competition in the video arena and undermine the economically efficient provision of services. The FCC has previously recognized that LECs have strong incentives to shift costs from competitive video services -- such as video dialtone and similar services -- to regulated telephone service.[85] Even though video dialtone regulations were repealed by the 1996 Act,[86] incentives for cross-subsidization have not changed. Common carriers seeking to become OVS operators remain the new entrants in the video marketplace with powerful economic assets and the intense desire to dominate the industry.[87] They still have every incentive to gain a competitive edge in the marketplace, especially by setting prices as low as possible however it is achieved to gain market share as

[84] See, e.g., 47 U.S.C. § 201(b).

[85] See Video Dialtone Reconsideration Order, 10 FCC Rcd at 344.

[86] See 1996 Act, § 302(b)(3). Video dialtone systems approved by to the date of enactment need not be terminated. Id.

[87] See e.g., L. Moss, "Smith Urges Advertisers to Pursue Interactive World," Multichannel News at 24 (Feb. 6, 1995); see also "Align and Conquer," Wired at 116 (Feb. 1995).

quickly as possible.[88] In the absence of a basic cost allocation framework, there is no reasonable or articulated basis to conclude that LECs operating OVS platforms will not cross-subsidize their integrated systems to the detriment of both their telephone customers and competing video programming services.[89]

Record evidence and experience suggest that the commingling of video costs with telephony service costs is likely.[90] A NARUC audit of Pacific Bell's performance under price caps in California from 1990-1994 demonstrated that Pacific Bell improperly cross-subsidized hundreds of millions of dollars of investment and expense in competitive broadband development.[91] In addition, SNET has consistently promoted a proposed cost allocation methodology that would improperly shift the substantial majority of the costs of its

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[88] See "Interview with Lee Camp," Inside Line News Bulletin at 3 (Sept. 27, 1995); "Pacific Telesis Telco to Offer Wireless Cable Television," Press Release (July 25, 1995) (quoting Pacific CEO Michael Fitzpatrick).

[89] In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, CC Docket 87-266, Fourth Report and Order at ¶ 18 (rel. Aug. 14, 1995) ("Streamlined Section 214 Order"). ("In light of the injunctions barring enforcement of Section 613(b) of the Cable Act, a primary concern about LEC construction of stand-alone cable systems is that telephone ratepayers not bear the burden of the investment in those systems.")

[90] See Price Cap Performance Review for Local Exchange Carriers; Treatment of Video Dialtone Services Under Price Cap Regulation, CC Docket 94-1, Second Report and Order and Third Further Notice of Proposed Rulemaking, 10 FCC Rcd 11098, 11102 (1995) ("In our view, the record in this proceeding does not demonstrate that LEC productivity gains in the provision of video dialtone service will equal or exceed historic productivity in the provision of telephony."). Thus, any commingling of costs will negatively affect price cap rates.

[91] See Letter from CCTA to Kathleen M.H. Wallman, FCC, dated September 21, 1994, at 54 (citing National Association Regulatory Utility Commissioners, An Audit of the Affiliate Interests of the Pacific Telesis Group, July 1994).

$4.5 billion hybrid-fiber coaxial network to its telephony customers.[92] Other LECs, such as Bell Atlantic and Pacific continue to justify installation and construction of new multi-use networks on the basis of the alleged significant cost advantages the network will provide for telephone service.[93] For these reasons, the Commission should require all information before OVS certification that it has previously deemed crucial to cost allocation issues.[94]

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[92] See, e.g, Connecticut DPUC Docket No. 95-03-10, Application of SNET for Approval to Conduct a Dial Tone Transport and Switching Market Trial, Decision (June 30, 1995) at 12, 16; Connecticut DPUC Docket No. 95-06-17, Application of SNET for Approval to Offer Unbundled Loops, Ports and Associated Arrangements and Application of SNET for Approval to Offer Wholesale Local Basic Service and Certain Related Features and Implement a Universal Service Fund, Decision (Dec. 20, 1995) at 77-78 ("[T]he Department remains unconvinced that SNET's approach conforms with the economic principle of cost causation. Furthermore, the methodology wholly ignores consideration for issues of capacity utilization and derived benefit. . . . The Department, therefore again rejects SNET's proposed allocation formula.").

[93] Pacific initially proposed to allocate 95% of its costs to telephony. Only after a year and a half and diligent and persistent efforts by the Common Carrier Bureau, Pacific relented and reduced this to 78%. See Letter from Alan Ciamporcero, Pacific Telesis to Kathleen M.H. Wallman, FCC, dated March 21, 1995, at 5-9. See also Amendment to The Bell Atlantic Telephone Companies Tariff FCC No. 10, Video Dialtone Service, Transmittal Nos. 741, 786 (Amended), CC Docket No. 95-145, Bell Atlantic Direct Case (filed Oct. 26, 1995). See also Application of SNET Personal Vision, Inc. for a Certificate of Public Convenience and Necessity to Operate a Community Antenna Television System, Connecticut Department of Public Utility Control, Docket No. 96-01-24, Testimony of Hoshang Mulla at 3 (filed Jan. 25, 1996).

[94] In numerous proceedings before the Commission, Joint Commenters repeatedly asked that the Commission require all common carriers that have constructed, or intend to construct, regulated telephone service and cable, video dialtone, or open video systems over the same network to prepare and submit complete and fully documented cost studies that demonstrate not only their estimated incremental costs for cable, video dialtone or open video systems, but also the incremental costs for telephone services, the joint and common costs for video and telephony services and the method for allocating joint and common costs between these service categories. See, e.g., Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1, CCTA Comments (filed May 9, 1994); CCTA Reply Comments (filed June 29, 1994); Price Cap Performance Review for Local Exchange Corners, Treatment of Video Dialtone Service Under Price Cap Regulations, CC Docket No. 94-1, CCTA Comments at 12-14 (filed April 17, 1994); CCTA Reply Comments at 16-19 (filed May 17, 1995). See, e.g., Third Data Request of Kathleen M.H. Wallman, Chief, Common Carrier Bureau, to Alan F. Ciamporcero, Pacific Telesis File Nos. W-P-C 6913, 6914, 6915, and 6916 (Dec. 9, 1994). With respect to the Commission's own actions in video dialtone proceedings, similar requests were made by the Common Carrier Bureau after Applications were filed.

Throughout the Commission's video dialtone proceedings, the cable industry asked that the Commission establish at the outset a coherent and verifiable policy grounded in sound economic principles for the allocation of the costs of an integrated system. Although, the Commission recognized that LECs had the potential to engage in anticompetitive conduct by "imposing added costs on the monopoly ratepayer by cross-subsidizing . . . new broadband services,"[95/] the Commission determined that it would be better to address pivotal cost allocation issues on a case-by-case, ad hoc basis, which ultimately proved to be extremely contentious and inefficient. The Commission should build upon its previous experiences and address at the outset these critical determinations so that it can minimize the potential for cross-subsidization. In this regard, Joint Commenters applaud the Commission for recognizing that a separate proceeding to address cost allocation issues is necessary.[96/] The Commission, however, should not relegate these critical issues solely to the Cost Allocation Manual ("CAM") process,[97/] as it is insufficient to address the cost allocation issues that arise with the deployment of OVS.[98/]

The CAM process is not, and was not, designed to resolve the basic cost questions that are presented with the deployment of integrated video/telephony networks. Rather, the CAM rules were developed for more "traditional" (and less far-reaching) nonregulated

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[95/] Telephone Company-Cable Television Cross Ownership Rules, Notice of Proposed Rulemaking, 2 FCC Rcd. 5092, 5093 (1987).

[96/] See NPRM at ¶ 70, n.82.

[97/] 47 C.F.R. §§ 64.901(a), 64.903(a), (c).

[98/] See NPRM at ¶ 70.

services such as electronic messaging[99] and payphone message delivery service.[100] As such, the CAMs were not designed to provide the FCC and interested parties with detailed information regarding all of the LECs' costs. Indeed, the CAM rules do not require carriers to submit actual cost information as part of their filings,[101] but instead require only a brief narrative description of the regulated and nonregulated services and supplies provided between the carrier and its unregulated affiliates and the allocation method utilized.[102]

Consequently, the information contained in CAM filings does not provide interested parties or the Commission with an opportunity to analyze or discern any critical joint cost allocation issues. Without the cost data, including the cost studies used to develop the data, there is no legitimate opportunity to uncover carrier subsidization of the costs of deploying video services with funds from regulated services.[103] If the Commission is to fulfill its core duty in this regard, it cannot and should not rely on such an inadequate framework.

The only effective means of ensuring that telephone ratepayers do not subsidize telephone company entry into unregulated video services is for the Commission to prescribe appropriate cost allocation rules. Moreover, this must be done prior to the filing of OVS

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[99] See, e.g., Pacific Bell's CAM for the Separation of Regulated and Nonregulated Costs, 6 FCC Rcd 5196 (1991).

[100] See, e.g., Ameritech, 10 FCC Rcd 9359 (1995).

[101] 47 C.F.R. § 64.903.

[102] See, e.g., Pacific Cost Allocation Manual, Revisions, at v-2, v-35, v-50, vi-4 (filed Sept. 14, 1995).

[103] As has been previously demonstrated, price caps as currently instituted will not prevent cross-subsidy. See, e.g., In the Matter of Price Caps Performance Review for Local Exchange Carriers, CC Docket 94-1, at 22-28 (filed March 1, 1996).

certification applications, given the extremely short timetable provided for approving these filings under the 1996 Act.[104]

Therefore, the Joint Commenters recommend that the Commission initiate a separate cost allocation rulemaking in order to determine both permanent and interim rules for cost allocation -- such as a gross allocation factor -- prior to certifying any OVS operators under the 1996 Act. In the event such proceeding is not completed prior to the time LECs may begin to seek OVS certification, the Commission should continue to address the issue on a case-by-case basis before issuing a certification by requiring the provision of all relevant information, including cost studies, to show that all common costs and depreciation expenses have been allocated properly.

III. THE PUBLIC INTEREST IN ROBUST VIDEO COMPETITION WILL BE SERVED BY PERMITTING NON-LOCAL EXCHANGE CARRIERS TO OPERATE AND UTILIZE OVS

In order to promote the Congressional objective that OVS introduce vigorous competition into entertainment and information markets,[105] the Commission should not preclude entities that are not LECs from operating their own open video systems or from obtaining access to another open video operator's system as a video programmer. Not only did Congress envision that OVS would provide an alternative regulatory scheme for cable operators to provide video programming, but as the Commission recognizes, allowing non-

[104] 1996 Act, § 653(a)(1).

[105] Conference Report at 178.

LECs to offer OVS will promote regulatory parity among providers and thereby foster competition and consumer choice in the video marketplace.[106]

A. Congress Contemplated That Cable Operators May Be Given the Option to Become OVS Operators

Section 653(a)(1) of the 1996 Act states that "an operator of a cable system or any other person may provide video programming through an open video system."[107] The Commission seeks comment on whether the statutory language in Section 653(a)(1) limits its ability to permit cable operators to become open video system operators,[108] apparently based on the fact that Congress used the term "provide video programming" to apply to the activities that cable operators may undertake on open video systems rather than the term "cable service."[109] When read in context and in light of explicit Congressional goals, the 1996 Act permits the Commission to allow cable operators to become OVS operators. Given the identified public interest benefits, the Commission should do so.

The plain language of Section 653(a)(1) permits cable operators to "provide video programming through an open video system that complies with this section."[110] As set forth in the Conference Report, Congress enacted Section 653 to promote competition in the

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[106] NPRM ¶ 64.

[107] 1996 Act, § 653(a)(1).

[108] NPRM at ¶ 64.

[109] "Cable service" is defined as "(A) the one-way transmission to subscribers of (1) video programming, or (ii) other programming service, and (B) subscriber interaction or use, if any, which is required for the selection of such video programming or other programming service." See 47 U.S.C. § 522(6), as amended by the 1996 Act, § 301(a)(1). Video programming means "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(19).

[110] 1996 Act, § 653(a)(1).

video marketplace and thereby "meet the unique competitive and consumer needs of individual markets."[111] Permitting cable operators or other persons to offer services in this manner, by offering an outlet for unaffiliated video program providers, would significantly further this goal by allowing cable operators to use their significant experience in the video distribution marketplace to serve as an outlet for diverse programming. In addition, it would enhance competitive parity by ensuring that cable operators and local telephone companies operate under similar regulatory constraints. Likewise, cable operators choosing to become OVS operators would be forced to make two-thirds of their capacity available to unaffiliated programmers.[112]

There is no evidence that Congress had any intent to prevent cable operators from offering services on an open video system. Indeed, if it had intended to do so, Congress could have expressly so stated. Moreover, Congress has often used the phrase "provide video programming" and even the term "transmission" of video programming interchangeably with the term "cable service." For example, in the now-repealed cable-telephone company cross-ownership provision, former Section 613(b)(1),[113] Congress made it unlawful for any common carrier to "provide video programming" directly to subscribers.[114] The Fourth Circuit has interpreted the term "provide video programming" expansively and determined that Section 613(b)(1) "essentially prohibits local telephone

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[111] Conference Report at 177.

[112] 1996 Act, § 653(b)(1)(B).

[113] 47 U.S.C. § 533(b) (repealed by 1996 Act, § 302(b)).

[114] <u>Id</u>.

companies from offering, with editorial control, cable television services to their common carrier subscribers."[115] Indeed, even the "transmission" of video programming has been used to mean the provision of cable service.[116]

Based upon previous use of these terms, it is most reasonable to conclude that Congress used the term "provide video programming" in Section 653(a)(1) to avoid the confusion that would have resulted from use of the term "cable service" in referring to cable operators offering video programming pursuant to Section 653(a)(1). By constructing a separate regulatory regime under Section 653, Congress plainly meant to distinguish cable operators who are not required, for example, to make capacity available to other programmers, from cable operators operating open video systems that must comply with such obligations.[117] Given the language that refers to the provision of an "open video system that complies with this section," that is intended to clarify that an open video system operated by a cable operator or other non-LEC must nonetheless meet all OVS obligations, it is only logical to conclude that Congress meant to use the term "provider of video programming" as it has been used in the past -- to refer to the offering of cable service.

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[115] Chesapeake & Potomac Telephone Co. of Virginia v. United States, 42 F.3d 181, 185 (4th Cir. 1994), cert. granted, 115 S. Ct. 608 (1995), vacated, remanded, sub nom. United States v. Chesapeake & Potomac Tel. Co., 134 L.Ed. 2d 46, 64 U.S.L.W. 4115 (1996) ("C&P Telephone").

[116] Thus, the District of Columbia Circuit has defined the term "transmission" of video programming" to implicate "active participation in the selection and distribution of video programming," or cable service. See National Cable Television Ass'n v. Federal Communications Commission, 33 F.3d 66, 73 (D.C. Cir. 1994).

[117] See 1996 Act, § 653(b)(1)(B).

For these reasons, the Commission should find that Section 653(a)(1) permits cable operators to operate their own open video systems and should take such action in this proceeding.

B. There Is No Reasonable Basis to Conclude That Cable Operators And Their Affiliates Can Be Prevented From Becoming Video Programmers On An OVS

The basic premise of OVS is that they are open, non-discriminatory systems available to all programmers on a fair basis. The 1996 Act specifically provides that open video system operators may not discriminate among video programming providers with respect to carriage on an open video system.[118/] Except when demand exceeds capacity on an open video system, capacity is not limited to any specific providers, and then only to limit the OVS operator itself from selecting video programming on more than one-third of the system.[119/] Nevertheless, the Commission asks whether an OVS operator "should be permitted to limit or preclude . . . the competing cable operator's ability to obtain capacity on the open video system . . . ."[120/]

Not only is there no legitimate statutory basis to exclude cable operators or their affiliates from utilizing the open video systems of local exchange carriers or other providers, there is no valid public policy reason to do so. Restrictions on the identity of video programmers that are permitted to seek carriage on open video systems would fundamentally undermine the Congressional intent in repealing the cable-telephone company cross-

[118/] Id. at § 653(B)(1)(A).

[119/] Id. at § 653(b)(1)(B).

[120/] NPRM at ¶ 15. There is absolutely no basis to conclude this is consistent with Congressional intent.

ownership restriction. As the Fourth Circuit has determined, a complete ban on access to channel capacity is a drastic measure that implicates the First Amendment.[121] As such, cable operators and affiliates should be permitted to obtain access to the open video systems. In fact, cable operators and their affiliates are the most likely class of video programmers in the marketplace that can take advantage of the opportunities created by OVS.

Unless the Commission expressly states that cable operators and their affiliates may obtain access to channel capacity on their open video systems, they will likely be excluded. For instance, Rainbow Programming Holdings, Inc. ("Rainbow"),[122] a wholly-owned subsidiary of Cablevision, has made several forays into the video dialtone business, seeking access to the video dialtone systems of US WEST, SNET, and Bell Atlantic, often to be denied or delayed.

Thus, Rainbow sought capacity from US WEST for the Omaha video dialtone system, but US WEST denied Rainbow's request because Rainbow had allegedly applied after US WEST's selection process, of which Rainbow had no notice or knowledge. Ultimately, unused channels surrendered on the platform were reallocated to other providers despite Rainbow's outstanding request.[123] Rainbow had an even more blatant situation with

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[121] C&P Telephone, 42 F.3d at 201-202.

[122] Rainbow is the managing partner of several partnerships that provide national and regional video programming distribution systems that serve millions of subscribers. These programming services include American Movie Classics, Bravo, News 12 Long Island, News 12 Westchester, News 12 Connecticut, MuchMusic, seven regional SportsChannel Services, NewSport, the national backdrop sports service of Prime SportsChannel Networks, The Independent Film Channel, and PRISM, a premium sports and movie service serving the Philadelphia market.

[123] See Letter of James T. Hannon to William F. Caton, File No. W-P-C-6868 (June 7, 1995); Letter of James T. Hannon to William F. Caton, File No. W-P-C-6868 (Nov. 15, 1995).

SNET, which initially delayed answering Rainbow's request for capacity because of its affiliation with Cablevision.[124/] Ultimately, SNET denied Rainbow's request for capacity, pointing to a never-before established "formal" request policy and the fact that its own affiliate had exhausted all remaining capacity.[125/] In fact, even when Rainbow has achieved its objective of obtaining access to channel capacity on a video dialtone system, it has been the victim of anticompetitive stall tactics. Rainbow requested and received 192 channels as a video programmer on Bell Atlantic's Dover Township system, but has had difficulty gaining access to the interface software and digital converters necessary to provide video programming to its end-user subscribers.

Without clear rules mandating equal access for all video programmers, regardless of their affiliation, robust competition, and the goals of OVS will be frustrated.[126/] In short, ensuring that cable operators and their affiliates can utilize the capacity on an OVS will enhance, rather than compromise, competition.

[124/] See Application of SNET for Approval to Trial Video Dial Tone Transport and Switching, Connecticut DPUC Docket No. 95-03-10, Hearing Transcript at 181-186, 658-665.

[125/] See, Letter of Donna N. Lampert, Counsel for Rainbow Programming Holdings, Inc., to Kathleen M.H. Wallman, Chief, Common Carrier Bureau, File No. W-P-C 6858 (July 6, 1995).

[126/] NPRM ¶ 15.

CONCLUSION

The OVS paradigm has tremendous potential to precipitate many public interest benefits. Based on its vast experience with related issues, the Commission should implement the 1996 Act's OVS mandate in accordance with the foregoing.

Respectfully submitted,

Donna N. Lampert
James J. Valentino
Charon J. Harris
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300

Robert Lemle
Charles Forma
Marti Green
CABLEVISION SYSTEMS CORPORATION
One Media Crossways
Woodbury, New York 11797
(516) 364-8450

Alan J. Gardner
Jerry Yanowitz
Jeffrey Sinsheimer
CALIFORNIA CABLE TELEVISION
ASSOCIATION
4341 Piedmont Avenue
Oakland, California 94611
(510) 428-2225

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CERTIFICATE OF SERVICE

I, Cheryl S. Flood, hereby certify that on this 1st day of April, 1996, I caused copies of the foregoing "Joint Comments of Cablevision Systems Corporation and The California Cable Television Association" to be sent by first-class mail, postage prepaid, or to be delivered by messenger(*) to the following:

Cheryl S. Flood

*John Nakahata, Special Assistant
Chairman Hundt's Office
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, D.C. 20554

*Richard Welch, Legal Advisor
Office of Commissioner Chong
Federal Communications Commission
Room 844
1919 M Street, N.W.
Washington, D.C. 20554

*James Casserly, Senior Legal Advisor
Office of Commissioner Ness
Federal Communications Commission
Room 832
1919 M Street, N.W.
Washington, D.C. 20554

*Blair Levin
Chief of Staff
Office of the Chairman
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, D.C. 20554

*Lauren Belvin, Senior Legal Advisor
Office of Commissioner Quello
Federal Communications Commission
Room 802
1919 M Street, N.W.
Washington, D.C. 20554

*Meredith Jones
Chief, Cable Services Bureau
Federal Communications Commission
Room 918
2033 M Street, N.W.
Washington, D.C. 20554

*Gary Laden, Chief
Policy and Rules Division
Cable Services Bureau
Federal Communications Commission
Room 918
2033 M Street, N.W.
Washington, D.C. 20554

*Kathleen Levitz, Deputy Bureau Chief
Common Carrier Bureau
Federal Communications Commission
Room 500
1919 M Street, N.W.
Washington, D.C. 20554

*Lawrence A. Walke, Attorney
Cable Services Bureau
Federal Communications Commission
Room 900
2033 M Street, N.W.
Washington, D.C. 20554

*Meryl S. Icove, Legal Advisor
Office of the Bureau Chief
Cable Services Bureau
Federal Communications Commission
Room 918
2033 M Street, N.W.
Washington, D.C. 20554

*Rick Chessen, Attorney
Policy and Rules Division
Cable Services Bureau
Federal Communications Commission
2033 M Street, N.W.
Room 918
Washington, D.C. 20554

*JoAnn Lucanik
Division Chief
Finanical Analysis and Compliance Division
Cable Services Bureau
Room 804
2033 M Street, N.W.
Washington, D.C. 20554

*William H. Johnson
Deputy Chief for Policy
Cable Services Bureau
Federal Communications Commission
2033 M Street, N.W.
Room 918
Washington, D.C. 20554

*Gary Laden, Division Chief
Cable Services Bureau
Policy and Rules Division
Cable Services Bureau
Federal Communications Commission
Room 406
2033 M Street, N.W.
Washington, D.C. 20554

*Regina Keeney, Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street N.W.
Room 500
Washington, D.C. 20554

*Margo Domon, Deputy Chief
Consumer Protection and Competition Division
Cable Services Bureau
Federal Communications Commission
Room 406
2033 M Street, N.W.
Washington, D.C. 20554

*Brian Foucart, Special Assistant to
the Bureau Chief
Cable Services Bureau
Federal Communications Commission
Room 918
2033 M Street, N.W.
Washington, D.C. 20554

*International Transcription Services
2100 M Street, N.W.
Room 140
Washington, D.C. 20037

David Nicoll
Neal Goldberg
National Cable Television Association
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Leonard J. Kennedy
Steven F. Morris
Thomas K. Gump
Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Suite 500
Washington, D.C. 20037

F1/51229.1